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NO. 1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

LEON MADOLE
Petitioner

VERSUS

STATE OF OKLAHOMA, ex rel
DEPARTMENT OF HIGHWAYS OF
THE STATE OF OKLAHOMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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February, 1970

KING LAW BRIEF Leonhardt Bldg., Oklahoma City — CE 5-2969

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The petitioner, Leon Madole, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oklahoma entered in this proceeding December 2, 1969.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reported at 462 P. 2d 261 and appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on December 2, 1969. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Is notice that the State intends to build a highway and that it is going to ask the Court to appoint commissioners to appraise the land to be taken which contains no other information and which affords no opportunity to be heard, sufficient as the only notice given in a suit to condemn real property, or does the due process clause of the XIVth Amendment of the Constitution of the United States require more.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Department of Highways instituted a condemnation action seeking to deprive Leon Madole of land needed for a highway, and personally served him with the following notice:

IN THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

No. 23869

State of Oklahoma, ex rel
Department of Highways of the
State of Oklahoma,
Plaintiff,

v.

Leon Madole and Ruth Madole,
husband and wife; and
American General Life Insurance Co.,
Defendants

NOTICE TO DEFENDANTS

THE STATE OF OKLAHOMA,
TO THE AFORESAID DEFENDANTS:

You are hereby notified that the Department of Highways of the State of Oklahoma, under and by virtue of the laws of the State of Oklahoma, in the name of the State of Oklahoma, as plaintiff in the above entitled cause has determined to locate a public State Highway upon the following described real estate, to-wit:

[Tract described by metes and bounds]

And that having been unable to procure the right-of-way from you, by private purchase, the plaintiff will on the 3rd day of October, 1968, at the hour of 9:00 A.M., or as soon thereafter as counsel can be

heard, make application to the Judge of the District Court of Cleveland County, Oklahoma, at its chambers in the court house at Norman, Oklahoma, for an Order appointing three disinterested free holders of said county as commissioners who shall be selected by said Judge from the current jury list of said county to inspect said real property and consider the injury, if any, which the owners thereof, may sustain by reason of such public highway, and by reason of such appropriation of said land, for such purposes, at which time you may be present if you so desire.

STATE OF OKLAHOMA, EX REL
DEPARTMENT OF HIGHWAYS OF THE
STATE OF OKLAHOMA, CHIEF OF
LEGAL DIVISION

(By: Floyd W. Taylor)
ATTORNEY FOR HIGHWAY DEPARTMENT

This notice may be found in the opinion of the Court in the appendix hereto and at page T-59 of the transcript of record and in the official reporter 462 P. 2d 261, 262.

No other notice was ever given Mr. Madole. In Oklahoma there is no opportunity at the time the commissioners are appointed to give testimony regarding the value of the land; and the commissioners have no hearings and give no notice of their proceedings.

The commissioners were appointed, appraised the damage to the land and reported their findings to the Court. Thirty days later, judgment was entered against Mr. Madole based on the finding of the commissioners. Sometime later, Mr. Madole went to the court house and asked when he could expect to hear what the appraisers

estimated the land was worth and was informed that judgment had already been entered against him.

Not long after Mr. Madole filed a motion in the case, worded as follows:

> "Come now Leon Madole and Ruth Madole, the defendants herein, and move the Court to vacate the judgment rendered against them in the above styled case for the reason that the notice given them was not sufficient to meet the due process requirements of the 14th Amendment of the Constitution of the United States. Insufficient notice is not notice at all and without proper notice, the Court does not acquire jurisdiction."

The matter came on for hearing. Upon the basis of briefs filed and the argument of counsel, the District Court vacated the judgment previously entered in the case and directed that the case be allowed to proceed to a jury trial. Whereupon, the Department of Highways filed an application and petition asking the Supreme Court of Oklahoma to assume original jurisdiction and issue a writ of prohibition to prevent District Judge Elvin Brown from proceeding to a jury trial. In the proceeding in the Supreme Court of Oklahoma, Judge Elvin Brown was technically the party respondent, but Leon Madole was the real party respondent and he and his attorneys prepared and presented the case and the Supreme Court of Oklahoma reviewed the case below on its merits.

The issue before the Supreme Court of Oklahoma was precisely the same as that presented here and in the Trial

Court and was worded as follows in the brief of Mr. Madole filed below:

> " 'Is notice that, at a given time and place, the State will make application to the Court for appointment of Commissioners to appraise property which the State wants to take for a highway, sufficient to meet the due process requirements of the 14th Amendment of the Constitution of the United States for a notice in a condemnation suit?' "

The Supreme Court of Oklahoma examined the notice and their decision turned on the question of its sufficiency. No other question or proposition is discussed in their opinion.

> "Respondent contends that the notice that on a date certain the condemnor would present its application to the district court for the appointment of commissioners to assess the damage to the land involved was insufficient to comply with the due process of law requirements of the Fourteenth Amendment of the U. S. Constitution. This contention is based upon the following propositions: a) the notice was not reasonably calculated to inform the owners of the land that they had been sued; b) the notice failed to apprise the owners of the land of the nature of the claim against them and the relief sought; and, c) it failed to afford the owners of the land an opportunity to be heard concerning the matter of just compensation.
>
> The respondent directs our attention to cases from the U.S. Supreme Court, as well as from our own court, which hold that unless the method of obtaining service upon a defendant is reasonably calculated to inform him of the pendency of a proceeding that such *attempted service* [emphasis of the Court] may be

declared null and void as insufficient under the due process clause of the U.S. Constitution. The cases cited to this effect by respondent are: Mullane v. Central Hanover Bank and Trust Co. (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Schroeder v. City of New York (1962), 371 U.S. 208, 9 L.Ed. 255, 83 S. Ct. 279, 89 A.L.R. 2d 1398; Walker v. City of Hutchinson, et al. (1956) 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178; and Bomford v. Socony Mobil Oil Co. (1968), Okl., 440 P. 2d 713.

While the cited cases undoubtedly stand as authority for the general proposition of constitutional law, as stated above, unless the notice served on the landowners in this matter was not sufficient to apprise them of the pendency of the condemnation proceeding then, we believe, such cases are of no application here. *Of course, if the notice was insufficient to notify the owners that a condemnation proceeding had been commenced, then it would seem the respondent should have vacated its order appointing the commissioners for their award of compensation would be, to say the least, suspect as an invalid award assuming it was not subsequently superseded by a verdict of a jury.*" [Emphasis ours] 462 P. 2d 261, 264, and page T-62 of the transcript of record.

The opinion of the Supreme Court of Oklahoma was entered December 2, 1969, and the writ was granted prohibiting District Judge Elvin Brown from proceeding with a jury trial. This judgment is a final one in the Courts of Oklahoma and unless reversed, Leon Madole, the real party in this case, has no further recourse in the courts.

REASONS FOR GRANTING THE WRIT

1. THE QUESTION IS AN IMPORTANT ONE WHICH AFFECTS MILLIONS OF PEOPLE.

Every state and each state's subdivisions, for high-

ways, urban renewal, airports, utilities and a myriad other public purposes, must, and increasingly does deprive its citizens of property in condemnation proceedings. Notice, as an element of due process is essential to each and every such deprivation and the question of what information that notice must contain is vitally important to the citizens of every state and city.

2. THE QUESTION PRESENTED HERE HAS NEVER BEEN DECIDED BY THIS COURT.

This Court has decided cases regarding the manner in which notice is given, *Mullane v. Central Hanover Bank and Trust Co.* (1950), 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652; *Walker v. City of Hutchinson, Kansas* (1956), 352 U.S. 112, 1 L.Ed. 2d 178, 77 S.Ct. 200. It has decided cases regarding some of the purposes of notice, *Windsor v. McVeigh* (1876), 93 U.S. 274 (3 Otto) 23 L.Ed. 914, *Roller v. Holley* (1900), 176 U.S. 398, 44 L.Ed. 520, 20 S.Ct. 410; *Coe v. Armour Fertilizer Works* (1915), 237 U.S. 413, 59 L.Ed. 1027, 35 S.Ct. 625. And cases which in effect say that the notice must be presented in a manner which the defendant will understand, *Covey v. Town of Somers* (1956), 351 U.S. 141, 100 L.Ed. 1021, 76 S.Ct. 724; *Schroeder v. New York City* (1962), 371 U.S. 208, 9 L.Ed. 2d 255, 83 S.Ct. 279, 89 A.L.R. 2d 1398. But this Court has not decided what information the notice must contain. All these cases and others were cited to the Supreme Court of Oklahoma which found all of them distinguishable from the case below because, though they dealt with the manner

in which notice is made and its purposes, they do not decide the question of what information notice must contain, and your petitioner was unable to cite them any case that did. No question could be more basic nor more in need of a decision.

3. THE ABSENCE OF A DECISION REGARDING THE CONTENT OF NOTICE MAKES POSSIBLE COMPLETE FRUSTRATION OF ALL THE RELATED DECISIONS REGARDING THE MANNER IN WHICH NOTICE IS GIVEN.

A reading of the cases cited in paragraph 2 above will leave the reader with the clear conviction that due process requires that a defendant be given notice which is reasonably calcuated to inform him of the pendency of the action and which affords him an opportunity to be heard.

The Supreme Court of Oklahoma has acknowledged the cases of the Court.

> "The general rule that emerges from Mullane and subsequent cases is simple; a state cannot invest itself with, and exercise through its courts, judicial jurisdiction over a person in a proceeding which may directly and adversely affect his legally protected interests, unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard." *Bomford v. Socony Mobil Oil Co.*, 440 P. 2d 713 (Okla. 1968)

But below, in the case at bar, the Supreme Court of Oklahoma found that personal service of a notice, the contents of which are not meaningfully calculated to advise

the landowner even that a suit is filed, satisfied due process. Using legal jargon, the notice considered by the Court below skirts the issue and does not directly tell a defendant he has been sued.

> ". . . The Department of Highways, . . . as plaintiff in the above entitled cause has determined to locate a public state highway upon the following described real estate . . ."

And yet, once the defendant is served such a notice, he is charged with constructive notice of all further proceedings in the case. Nor does it inform him of the relief sought. To judge from the notice alone, as we must, the state in this proceeding sought nothing more than an appraisal of defendant's land:

> ". . . The plaintiff will on the 3rd day of October, 1968, at the hour of 9:00 A.M., or as soon thereafter as counsel can be heard, make application to the Judge of the District Court . . . for an order appointing three disinterested freeholders of said county as commissioners who shall . . . inspect said real property and consider the injury, if any, which the owners thereof may sustain by reason of such public highway, and by reason of such appropriation of said land, for such purposes, at which time you may be present if you so desire."

In fact a suit had been filed which sought to deprive the defendant of title to his land and to conclusively settle by litigation the amount he was to be paid for it.

The Supreme Court of Oklahoma placed its emphasis upon the method of service without regard to the content

of the paper served. Service of a blank sheet of paper, however technically perfect, is not notice. An unintelligible paper is as bad as a blank one and a misleading one is worse. The notice approved below was uninformative and misleading. It was not calculated to inform Mr. Madole that he had been sued and it afforded him no opportunity to be heard. Personal service of such notice merely lends a surface respectability to a flagrant violation of due process. A decision of this Court regarding the information required in a notice is needed to avoid frustration of recent decisions like Walker and Mullane. Review of this case would give the nation such a decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Oklahoma.

Respectfully submitted,

THOMAS H. TUCKER
WILLIAM H. HENDERSON
2500 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 43,659

STATE OF OKLAHOMA, ex rel DEPARTMENT OF HIGHWAYS OF THE STATE OF OKLAHOMA, Petitioner,

v.

HONORABLE ELVIN J. Brown, Judge of the District Court of the 21st Judicial District, Cleveland County, Oklahoma, Respondent.

ORIGINAL PROCEEDING FOR WRIT OF MANDAMUS AND/OR PROHIBITION - WRIT GRANTED

John Paul Walters,
Chief, Legal Division,
Department of Highways,
By: Robert D. Baron, For Petitioner,

Thomas H. Tucker,
Norman, Oklahoma, For Respondent.

LAVENDER, J.:

This is a proceeding, originally begun in this court, to prohibit the respondent judge of the district court of Cleveland County, Oklahoma, from proceeding to exercise judicial authority or discretion in a condemnation proceeding in that court. In that proceeding the State of Oklahoma on the relation of its Department of Highways served the

following notice personally upon the owners of the lands described in said notice:

"Form DH 307-6

In the District Court of Cleveland County, Oklahoma

No. 23869

State of Oklahoma ex rel.
Department of Highways of
the State of Oklahoma,
Plaintiff

v.

Leon Madole and Ruth Madole,
husband and wife; and American
General Life Insurance Co.,
Defendants

NOTICE TO DEFENDANTS

The State of Oklahoma,
To the Aforesaid Defendants:

You are hereby notified that the Department of Highways of the State of Oklahoma, under and by virtue of the laws of the State of Oklahoma, in the name of the State of Oklahoma, as plaintiff in the above entitled cause has determined to locate a public State Highway upon the following described real estate, to-wit:

[Tract described by metes and bounds]

And that having been unable to procure the right-of-way from you, by private purchase, the plaintiff will on the 3rd day of October, 1968, at the hour of

9:00 A.M., or as soon thereafter as counsel can be heard, make application to the Judge of the District Court of Cleveland County, Oklahoma, at its chambers in the court house at Norman, Oklahoma, for an Order appointing three disinterested free holders of said county as commissioners who shall be selected by said Judge from the current jury list of said county to inspect said real property and consider the injury, if any, which the owners thereof may sustain by reason of such public highway, and by reason of such appropriation of said land, for such purposes, at which time you may be present if you so desire.

STATE OF OKLAHOMA, EX REL
DEPARTMENT OF HIGHWAYS OF THE
STATE OF OKLAHOMA
JOHN PAUL WALTERS,
CHIEF OF LEGAL DIVISION
By: FLOYD W. TAYLOR
ATTORNEY FOR HIGHWAY DEPARTMENT"

One of the owners of the land—Mr. Madole—was present in court on the date specified in the notice, but made no objection to the appointment of commissioners.

Thereafter, on the 22nd day of October, 1968, the said commissioners filed their written report with the clerk of the court, as required by 69 O.S.Supp. 1968 §1203. Thereafter, a period of time in excess of sixty days elapsed without either the condemnor or the landowners filing any demand for a jury trial on the question of the compensation allowed by the commissioners. Their appraisal was in the amount of $4,000.00.

Thereafter, the landowners filed an application the effect of which was to attack the commissioners' award of

compensation and to ask the court to allow that issue to be presented to a jury. This application was filed on April 8, 1969. At a hearing on that application, the respondent entered an order which did not vacate the court's previous order appointing commissioners nor vacate or set aside their report of the damages to the land involved, but provided from its date the landowners would have sixty days within which to demand a jury trial on the question of damages. That order was entered by the trial court on June 28, 1969, which was 228 days after the commissioners' report was filed.

We are concerned with whether that order was valid or whether it was beyond the power and jurisdiction of the respondent court to make. We assume original jurisdiction.

Section 24 of Article 2 of the Constitution of the State of Oklahoma provides, among other things, that in proceedings to condemn lands for public use commissioners shall be appointed by a judge or court upon *reasonable* notice to the owners of land to be affected. The constitutional provision also provides that if any party to the proceeding believes himself aggrieved by the award of the commissioners, he shall have the right of appeal and to a trial by jury in a court of record.

The condemnation proceeding in this case was commenced under Section 1203 of Article 12 of House Bill No. 501 of the Second Regular Session of the Thirty-First Oklahoma Legislature (69 O.S.Supp. 1968 §1203) which section

provides in essence for appointment of the commissioners upon ten days' notice to the opposite party; that the commissioners' report as to the amount of damages to be sustained by the landowner shall be filed with the clerk of the court. That section further provides for a "review" of the commissioners' report by the district court provided objections thereto be filed by either party within thirty days following the filing of the commissioners' report with the clerk. The statute also provides that either party may have a trial by jury upon the question of compensation provided they file a written demand therefor with the clerk before the expiration of sixty days from and after the filing of the commissioners' report. There is a further provision for appeal to the Supreme Court from the actions of the district court.

At this point, it should be noted that there was no contention made in the trial court or in this court that the notice did not comply with the statutes nor that it was not properly served. A copy was served personally on Mr. Madole and a copy for his wife was left with him at their residence. Service was had upon the mortgagee by serving the proper officer of that institution. Neither is the fact disputed that the notice, a copy of which appears above, was the only notice served upon the landowners. Such a notice appears to be the only one required by the statutes of Oklahoma in condemnation proceedings. As a matter of fact, this is made clear by another part of Section 1203, supra, which provides, in certain circumstances, for the

publication of such a notice as "in civil action, except summons need not be issued and served."

Petitioners contend that the notice meets the requirements of Section 1203 and that the latter statute is in harmony with the above referred to provisions of the Constitution of Oklahoma, and that under such cases as *State ex rel. Southwestern Natural Gas Co. v. Brewer, District Judge* (1938), 184 Okl. 129, 87 P. 2d 954; *Stedman v. State Highway Commission* (1935), 174 Okl. 308, 50 P. 2d 657; and *Western Farmers Electric Cooperative v. Rowlett et al.* (1955), Okl., 288 P. 2d 726, the respondent court was without authority to enter the order pursuant to which the landowners were permitted to file their request for a jury trial long after the statutory period for the filing of the same had expired.

Respondent contends that the notice that on a date certain the condemnor would present its application to the district court for the appointment of commissioners to assess the damage to the land involved was insufficient to comply with the due process of law requirements of the Fourteenth Amendment to the U.S. Constitution. This contention is based upon the following propositions: a) the notice was not reasonably calculated to inform the owners of the land that they had been sued; b) the notice failed to apprise the owners of the land of the nature of the claim against them and the relief sought; and, c) it failed to afford the owners of the land an opportunity to be heard concerning the matter of just compensation.

The respondent directs our attention to cases from the U.S. Supreme Court, as well as from our own court, which hold that unless the method of obtaining service upon a defendant is reasonably calculated to inform him of the pendency of a proceeding that such *attempted service* may be declared null and void as insufficient under the due process clause of the U.S. Constitution. The cases cited to this effect by respondent are: *Mullane v. Central Hanover Bank and Trust Co.* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; *Schroeder v. City of New York* (1962), 371 U.S. 208, 9 L.Ed. 255, 83 S.Ct. 279, 89 A.L.R. 2d 1398; *Walker v. City of Hutchinson et al.* (1956), 352 U.S. 112, 77 S.Ct. 200. 1 L.Ed. 2d 178; and *Bomford v. Socony Mobil Oil Co.* (1968), Okl., 440 P. 2d 713.

While the cited cases undoubtedly stand as authority for the general proposition of constitutional law, as stated above, unless the notice served on the landowners in this matter was not sufficient to apprise them of the pendency of the condemnation proceeding then, we believe, such cases are of no application here. Of course, if the notice was insufficient to notify the owners that a condemnation proceeding had been commenced, then it would seem the respondent should have vacated its order appointing the commissioners for their award of compensation would be, to say the least, suspect as an invalid award assuming it was not subsequently superseded by a verdict of a jury.

The question now arises, how should a landowner be

notified of the commencement of a condemnation proceeding in order to satisfy the requirements of due process? Our Constitution, as well as our statute, requires only notice, which was given in this case, of the fact that at the end of ten days the district court would be requested to appoint commissioners to assess the damages to be awarded to the landowners which will result from an appropriation of their lands (describing them) for public uses.

In *North Laramie Land Company v. Hoffman et al.* (1925), 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953, the court had before it the statutes of Wyoming which provided for notice by publication, posting and mailing by registered mail to the landowners of a notice to the effect that the Board of County Commissioners were proposing to establish a roadway across the property of the landowner involved; that there would be an appraisal after which the Board would determine finally with regard to the establishment of the road and would fix the damages to be paid. The statute of Wyoming provided that the landowners affected would have thirty days, after that determination by the Board, within which to seek a judicial determination upon the damage issue. The U.S. Supreme Court observed that the statute afforded the landowners "* * *due process on the matter of damages, since the hearing in the District Court makes unnecessary a hearing before the board or the appraisers, and, through the publication of the board's action, the landowner is duly notified of the date from which his time for appeal begins to run." Regard-

ing the objection which was to the effect that the statutory procedure was not in accord with due process of law because it did not provide for formal notice to the landowner that the board had acted in fixing the damages to be allowed and had thus set in motion the time limitation within which the landowner could appeal to a court of law, the court said:

> "* * * a state statute does not contravene the provisions of that Amendment (the 14th) unless, in some substantial way, it infringes the fundamental rights of citizens and, in passing on the constitutionality of a state law, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.
>
> "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are

> reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. Huling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559; Ballard v. Hunter, 204 U.S. 241, at p. 262."

The discussion by the court on pages 286 and 287 of 268 U.S., also appears particularly appropriate to our problem.

The above cases of *North Laramie Land Co. v. Hoffman* and *Huling v. Kaw Valley Railway & Improvement Co.*, along with the more recent case (cited by respondent) of *Walker v. City of Hutchinson*, supra, are all discussed in an annotation appearing in 1 L.Ed. 2d 1640-1642. The *Walker* case appears clearly distinguishable from our case for the reason that in that case the owner had no notice of the condemnation proceedings until after the time authorized by statute for appealing the question of compensation to a court had elapsed.

"Reasonable notice" is all that is required by our Oklahoma Constitution, Section 24, Article 2. Reasonable notice does not necessarily mean and we think does not require, in order to satisfy due process of law requirements, a formal notification to a landowner of every right guaranteed to him by law, including the existence of statutory procedural limitations upon his right to be heard in court on the question of his damages.

Every person holds his lands subject to the right of

the sovereign to acquire an interest in it by condemnation proceeding if that interest is needed for public use. We are of the view and therefore hold that the only basic requirement protected by the Constitution in such cases is that the landowner have notice of the proceeding and an opportunity, at some stage in the proceeding, to be heard. 16A C.J.S. "Constitutional Law" §646, page 933. That opportunity to be heard is provided by statute in Oklahoma and the sixty day period following the filing of the commissioners' report and within which time one may demand a jury is not suggested to be unreasonable or arbitrary. While it may be desirable to notify a landowner of the filing of the commissioners' report in order to absolutely insure that a property owner be aware of the fact that the statutory limitation period has commenced running, we do not believe that such a requirement should be supplied by decree of this court in view of the fact that its absence does not render unconstitutional the procedural statute involved.

We hold that when a landowner is served with a notice, as the owners were in this case, it is reasonable to conclude that they are thus constructively notified that their rights to a trial upon the question of their damages may be lost by the passage of time; that it is not unreasonable to require a landowner in such a position to make arrangements with the clerk of the court to notify him when the commissioners' report has been filed. The landowner, as well as the condemning authority, should not

be permitted to sit idly by and allow the statutory time to pass and then to complain that he (or the State) wasn't specifically informed of certain rights, which only the *opportunity* to exercise, are guaranteed by the Constitution.

It is the order and judgment of this court that a writ be issued to the respondent herein commanding him to vacate his purported order of June 28, 1969, in cause numbered 23869, entitled "State of Oklahoma, ex rel Department of Highways of the State of Oklahoma, Plaintiff v. Leon Madole and Ruth Madole, husband and wife, and American General Life Insurance Co., Defendants," and to strike the demand for a jury trial filed in said cause by Leon Madole and Ruth Madole.

CONCURRING: Irwin, C. J. and Davison, Williams, Blackbird, and Jackson, JJ.

DISSENTING: Berry, V. C. J. and Hodges and McInerney, JJ.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 43,659

STATE OF OKLAHOMA, ex rel DEPARTMENT OF HIGHWAYS OF THE STATE OF OKLAHOMA, Petitioner,

v.

HONORABLE ELVIN J. BROWN, Judge of the District Court of the 21st Judicial District, Cleveland County, Oklahoma, Respondent.

McINERNEY, J.: (Dissenting)

The issue here is whether the content of condemnor's notice to the landowner meets the minimum standards of the XIVth Amendment's due process clause. This presents a question of *federal law.*

Federal protection of condemnee's claim to fair treatment and orderly process in procuring just compensation for his property is not the product of the present-day trend to a liberal construction of our constitutional commands. It antedates the turn of this century. *Chicago B.&Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). For at least five decades the states have stood constitutionally compelled to afford the owner a *meaningful opportunity* "to be heard and to offer evidence as to the value of the land taken." *Bailey v. Anderson,* 326 U.S. 203, 205, 66 S.Ct. 66, 67, 90 L.Ed.3 (1945); *Bragg v. Weaver,* 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919). Unless notice *reasonably conveys "the required information" and is plain to understand,* the process is a "mere gesture" and not due process. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-315, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); *Griffin v. Cook County,* 369 Ill. 380, 16 N.E. 2d 906, 118 A.L.R. 1157; 16 Am.Jur. 2d, Const. Law, §562, p. 966.

Condemnor's notice clearly did not contain the "required information" commanded by *Mullane.* While it advised condemnee of the time and place condemnor will present its application for appointment of the commissioners, it did *not* tell him that this was but the first step

in a multi-stage proceeding the object of which was to invest the State with title to the affected land. In short, there is nothing in the heavy legal jargon of the notice that would plainly convey to the owner that minimum which Anglo-American law has required of legal process since time immemorial—*that it inform the party served of the relief demanded against him and apprise him of the result consequent on his default.* This much, if not more, is required to be imparted by a civil summons. 12 O.S.Supp. 1969, §153. The recent amendment requiring a copy of the petition to be attached to the summons serves further to expand the quantum of knowledge our Legislature intended the defendant to have. 12 O.S.Supp. 1969, § 153.1. Far more information is required by statute to be contained in a notice issued under our administrative procedure. 75 O.S.Supp. 1969, §309. It borders indeed on a legal paradox to hold that litigants in these cases may enjoy more favorable treatment than condemnees who enjoy *express* federal protection from unfair state procedures.

The argument that our statutory provisions operate here to amplify the deficiency in the content of condemnor's notice is predicated on the principle of common law that "no one is excused by the ignorance of the law." This principle must yield in the face of a plain constitutional command as but an "illusory substitute" for notice. *Electric Short Line Term. Co. v. City of Minneapolis, Minn.*, 64 N.W. 2d 149, 153. Due process in its present-day form plainly places a limit on the application of this common-

law doctrine. *Lambert v. People of the State of California*, 355 U.S. 225, 228, 78 S.Ct. 240, 243 (1957). Any statement to the contrary that can be divined from *North Laramie Land Company v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925) may no longer be regarded as a correct exposition of the present federal law.

Condemnor's notice did not reasonably convey that quantum of information that federal due process requires. Its endorsement by me would be tantamount to approval of less favorable treatment for condemnees than that which stands afforded by Oklahoma law to litigants in nearly all other classes of suits. This course would give approval to an unreasonable classification of state litigants that, in my opinion, is violative of equal protection. *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760 (1966).

I would deny the writ by an opinion requiring more ample notice having prospective effect only, i.e. to this case and to all condemnation notices issued after the date the opinion became final. *Bomford v. Socony Mobil Oil Co.*, Okl., 440 P. 2d 713 (1968).

I am authorized to state that Berry, V. C. J. concurs in the views herein expressed.

PREME COURT, U. S.

FILED
MAR 6 1970
JOHN F. DAVIS, CLERK

No. 1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

LEON MADOLE
Petitioner

VERSUS

STATE OF OKLAHOMA, ex rel
DEPARTMENT OF HIGHWAYS of the
STATE OF OKLAHOMA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

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On the Brief

February, 1970

KING LAW BRIEF Leonhardt Bldg., Oklahoma City — CE 5-2969

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ON PETITION FOR A WRIT OR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reported at 462 P. 2d 261 and appears in Appendix A attached hereto.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTION PRESENTED

Is a condemning authority required to advise a defendant property owner of all legal steps, procedures, remedies, alternatives and time limitations in order to adequately notify him under the Due Process Clause of the XIVth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS

On September 12, 1968, the Department of Highways of the State of Oklahoma filed a petition in the District Court of Cleveland County, Oklahoma, to condemn certain land for the purpose of constructing a public highway. On that same day Leon Madole and Ruth Madole, husband and wife, were served with a copy of the following notice:

"Form DH 307-6

In the District Court of Cleveland County, Oklahoma

No. 23869

State of Oklahoma ex rel.
Department of Highways of
the State of Oklahoma,
Plaintiff

v.

Leon Madole and Ruth Madole,
husband and wife; and American
General Life Insurance Co.,
Defendants

NOTICE TO DEFENDANTS

The State of Oklahoma,
To the Aforesaid Defendants:

You are hereby notified that the Department of Highways of the State of Oklahoma, under and by virture of the laws of the State of Oklahoma, in the name of the State of Oklahoma, as plaintiff in the above entitled cause has determined to locate a public State Highway upon the following described real estate, to-wit:

[Tract described by metes and bounds]

And that having been unable to procure the right-of-way from you, by private purchase, the plaintiff will on the 3rd day of October, 1968, at the hour of 9:00 A.M., or as soon thereafter as counsel can be heard, make application to the Judge of the District Court of Cleveland County, Oklahoma, at its chambers in the court house at Norman, Oklahoma, for an Order appointing three disinterested free holders of said county as commissioners who shall be selected by said Judge from the current jury list of said county to inspect said real property and consider the injury, if any, which the owners thereof may sustain by reason

of such public highway, and by reason of such appropriation of said land, for such purposes, at which time you may be present if you so desire.

STATE OF OKLAHOMA, EX REL
DEPARTMENT OF HIGHWAYS OF THE
STATE OF OKLAHOMA
JOHN PAUL WALTERS,
CHIEF OF LEGAL DIVISION
By: FLOYD W. TAYLOR
ATTORNEY FOR HIGHWAY DEPARTMENT"

This notice may be found in the opinion of the Court in the appendix hereto and at page T-59 of the transcript of record and in the official reporter at 462 P. 2d 261, 262.

(The following day a copy of the same notice was served on the mortgagee of the property, who is not a party to this appeal.)

The above set out notice was personally served on Mr. Madole by two attorneys for the Highway Department, who at that time explained to him, in a general way, the steps in condemnation proceedings. This fact is uncontroverted, as is the fact that Mr. Madole was present in the court room at the time of the appointment of the commissioners, had a discussion with the Highway Department attorney at that time, and received further correspondence from the Highway Department attorney relating to the condemnation proceeding.

The commissioners appointed by the court on October 3, 1968, to appraise the Madole property filed their report with the clerk of the court on October 21, 1968, and assessed the value of the property taken and the damages to the remainder at $4,000.00.

Oklahoma law provides that any party to a condemnation action may file Exceptions to the Report of the Commissioners within thirty days after the filing thereof, and that any party thereto may demand a trial by jury on the question of damages by filing a written demand therefor within sixty days after the filing of the Commissioners' Report. Title 69, Oklahoma Statutes 1969 Supp., Section 1203 (e), which reads in pertinent part:

> "(e) The Report of Commissioners may be reviewed by the District Court, on written exceptions filed by either party in the Clerk's office within thirty (30) days after the filing of such Report, and the Court, after hearing had, shall make such order therein as right and justice may require, either by confirmation, rejection, or by ordering a new appraisement on good cause shown. . . . or either party may within sixty (60) days after the filing of such Report file with the Clerk a written demand for trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the District Court."

In this case, no party filed either Exceptions to the Report of the Commissioners or a Demand for Jury Trial within the time set out by statute. Therefore, the only action left to the District Court was to enter an Order Approving and Confirming the Report of the Commissioners.

In fact, this had not yet been done when Mr. Madole filed his motion in the District Court styled "Motion to Vacate Judgment." It is usual practice in Oklahoma for the Order Approving and Confirming the Report of the

Commissioners to be entered upon proper motion of the condemnor, and in this instance the Highway Department had not yet presented the Order to the District Court.

The pleading styled "Motion to Vacate Judgment" was filed by Mr. Madole's attorney in the District Court on April 8, 1969, one hundred and sixty-nine (169) days after the filing of the Report of the Commissioners, and one hundred and nine (109) days after the ending of the statutory time for filing a Demand for Jury Trial. The ruling of the District Court allowing Mr. Madole additional time within which to demand a trial by jury (T-22) was entered on June 28, 1969.

Immediately thereafter, the Oklahoma Department of Highways sought and obtained a Writ of Prohibition in the Supreme Court of Oklahoma to prohibit the District Court from proceeding further in the *Madole* case. The reason urged on the appeal for the Writ, and the reason it was granted, was that the District Court was without jurisdiction to conduct further proceedings in that case. The expiration of the statutory time limit had left the District Court without jurisdiction to exercise judicial (as opposed to ministerial) power in the case.

ARGUMENT

I. The decision of the Oklahoma Supreme Court in this case was correct.

The Respondent feels that the decision of the Oklahoma Supreme Court (reported at 462 P. 2d 261 and appearing in Appendix A attached hereto) was correct. The

Court's consideration of the applicable federal decisions, including *North Laramie Land Company v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925), allowed it to reach the proper result.

This, in fact, is almost conceded by Petitioner, who requests this Court to issue a Writ of Certorari because of "the absence of a decision regarding the content of notice" (Petitioner's Brief, P. 9). Under such an argument, it would follow that the ruling of the Oklahoma Court is correct under the statutes and in the absence of conflicting case law.

II. The condemning authority should not be required to aid condemnees in the prosecution of actions against it.

It appears that the Petitioner has been arguing, in the cases below and in this Court, that the Respondent had a duty to advise the condemnee of all the steps he had to follow to maintain his standing in Court during the pendency of the condemnation proceeding. The Respondent believes that once it has advised the condemnee of the pendency of the action it is the duty of the condemnee-land owner to take some positive action to ensure that his rights will not fail with the passage of time. See the opinion of the Oklahoma Court, 462 P. 2d at 266, or at T-66 of the Transcript of Record; also, *In Re: Condemnation Suits by United States*, D.C., E.D. Tenn., 234 F. 443, 446 (1916).

The Respondent further argues most strongly that it should not be required to take condemnees "by the hand" and aid them in the prosecution of actions against it. Al-

though the Highway Department quite clearly recognizes that it has a duty to fully notify condemnee-land owners of the action brought against them (as it has a duty to first attempt to negotiate the purchase with them, to advise them of any relocation or other allowance payments that they may be entitled to, et cetera), it is suggested that the adversary nature of the proceeding would break down if the condemnor was required to give more legal aid and counsel to condemnees than it does under present rulings and statutes.

It should be remembered that condemnation actions are brought for the benefit of the people of the State because the condemning authority and the land-owner have not been able to agree on the value of the property. The condemnor should not in any way be put in a disadvantaged position in these negotiations and proceedings by requiring that it furnish counsel and advice (beyond Constitutionally required notice) to the condemnees.

III. The petitioner in this case cannot make a good faith protestation as to the sufficiency of the notice he received.

This is a case where the condemnee was fully advised of his rights and then slept on them. When Mr. Madole was *personally* served with the Notice to Defendants, it was given to him by two Highway Department attorneys. At that time, they explained condemnation proceedings to him. He was also present in the court-room when the Commissioners were appointed. He had a conversation with a

Highway Department attorney at that time. He received later correspondence from the Highway Department attorney relative to the proceeding. All of this is conceded by the Petitioner. See the opinion of the Oklahoma Court, 462 P. 2d 261, 263, and at T-60, 61, 62 of the Transcript of Record.

The Respondent respectfully suggests that any suggestion that Mr. Madole was not made as fully aware of his rights as it was possible to do is wholly without basis in fact.

IV. The question raised in petitioner's brief affects only the petitioner in this case.

The statutory requisite for the content of the Notice to Defendants in a condemnation action varies from jurisdiction. Therefore, it is urged that the facts in this case are applicable only to the statutes of Oklahoma, and the interpretation thereof by the Oklahoma Court should not be overturned.

Further, Respondent believes that the facts of this case are limited to the Petitioner's situation. He is the only person, to the knowledge of the Respondent, to have raised this question. The Notice to Defendants now given by the Oklahoma Department of Highways has been changed since this action was commenced (see Appendix B). Therefore, even if this Court should hear this case and decide in favor of the Petitioner, if the opinion were to operate prospectively it would only affect this one individual. (Of course, if the opinion were to operate retroactively it would

effectively negate all past acquisition of land by the Oklahoma Highway Department and place an insufferable burden on the taxpayers of that State. They would, in effect, have to purchase all highway right-of-way all over again.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Oklahoma City, Oklahoma 73105
Counsel for Respondent

ROBERT D. BARON
Attorney, Legal Division
Department of Highways of the
State of Oklahoma
On the Brief

February, 1970

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

No. 43,659

STATE OF OKLAHOMA, ex rel DEPARTMENT OF HIGHWAYS OF THE STATE OF OKLAHOMA,
Petitioner,

v.

HONORABLE ELVIN J. BROWN, Judge of the District Court of the 21st Judicial District, Cleveland County, Oklahoma,
Respondent.

ORIGINAL PROCEEDING FOR WRIT OF MANDAMUS AND/OR PROHIBITION

WRIT GRANTED

John Paul Walters,
Chief, Legal Division,
Department of Highways,
By: Robert D. Baron,
For Petitioner,

Thomas H. Tucker,
Norman, Oklahoma,
For Respondent.

LAVENDER, J.:

This is a proceeding, originally begun in this court, to prohibit the respondent judge of the district court of Cleveland County, Oklahoma, from proceeding to exercise judicial authority or discretion in a condemnation proceeding in that court. In that proceeding the State of Oklahoma on the relation of its Department of Highways served the

following notice personally upon the owners of the lands described in said notice:

"Form DH 307-6

In the District Court of Cleveland County, Oklahoma

No. 23869

State of Oklahoma ex rel.
Department of Highways of
the State of Oklahoma,
Plaintiff

v.

Leon Madole and Ruth Madole,
husband and wife; and American
General Life Insurance Co.,
Defendants

NOTICE TO DEFENDANTS

The State of Oklahoma,
To the Aforesaid Defendants:

You are hereby notified that the Department of Highways of the State of Oklahoma, under and by virtue of the laws of the State of Oklahoma, in the name of the State of Oklahoma, as plaintiff in the above entitled cause has determined to locate a public State Highway upon the following described real estate, to-wit:

Tract described by metes and bounds

And that having been unable to procure the right-of-way from you, by private purchase, the plaintiff will on the 3rd day of October, 1968, at the hour of 9:00 A.M., or as soon thereafter as counsel can be heard, make application to the Judge of the District Court of Cleveland County, Oklahoma, at its chambers

in the court house at Norman, Oklahoma, for an Order appointing three disinterested free holders of said county as commissioners who shall be selected by said Judge from the current jury list of said county to inspect said real property and consider the injury, if any, which the owners thereof may sustain by reason of such public highway, and by reason of such appropriation of said land, for such purposes, at which time you may be present if you so desire.

STATE OF OKLAHOMA, EX REL
DEPARTMENT OF HIGHWAYS OF THE
STATE OF OKLAHOMA
JOHN PAUL, WALTERS,
CHIEF OF LEGAL DIVISION
By: FLOYD W. TAYLOR
ATTORNEY FOR HIGHWAY DEPARTMENT"

One of the owners of the land—Mr. Madole—was present in court on the date specified in the notice, but made no objection to the appointment of commissioners.

Thereafter, on the 22nd day of October, 1968, the said commissioners filed their written report with the clerk of the court, as required by 69 O.S.Supp. 1968 §1203. Thereafter, a period of time in excess of sixty days elapsed without either the condemnor or the land-owners filing any demand for a jury trial on the question of the compensation allowed by the commissioners. Their appraisal was in the amount of $4,000.00.

Thereafter, the landowners filed an application the effect of which was to attack the commissioners' award of compensation and to ask the court to allow that issue to be presented to a jury. This application was filed on April 8, 1969. At a hearing on that application, the respondent entered an order which did not vacate the court's previous

order appointing commissioners nor vacate or set aside their report of the damages to the land involved, but provided from its date the landowners would have sixty days within which to demand a jury trial on the question of damages. That order was entered by the trial court on June 28, 1969, which was 228 days after the commissioners' report was filed.

We are concerned with whether that order was valid or whether it was beyond the power and jurisdiction of the respondent court to make. We assume original jurisdiction.

Section 24 of Article 2 of the Constitution of the State of Oklahoma provides, among other things, that in proceedings to condemn lands for public use commissioners shall be appointed by a judge or court upon *reasonable* notice to the owners of land to be affected. The constitutional provision also provides that if any party to the proceeding believes himself aggrieved by the award of the commissioners, he shall have the right of appeal and to a trial by jury in a court of record.

The condemnation proceeding in this case was commenced under Section 1203 of Article 12 of House Bill No. 501 of the Second Regular Session of the Thirty-First Oklahoma Legislature (69 O.S.Supp. 1968 §1203) which section provides in essence for appointment of the commissioners upon ten days' notice to the opposite party; that the commissioners' report as to the amount of damages to be sustained by the landowner shall be filed with the clerk of the court. That section further provides for a "review" of the commissioners' report by the district court provided objections thereto be filed by either party within thirty days following the filing of the commissioners' report with the clerk. The statute also provides that either party may have a trial by jury upon the question of compensation

provided they file a written demand therefor with the clerk before the expiration of sixty days from and after the filing of the commissioners' report. There is a further provision for appeal to the Supreme Court from the actions of the district court.

At this point, it should be noted that there was no contention made in the trial court or in this court that the notice did not comply with the statutes nor that it was not properly served. A copy was served personally on Mr. Madole and a copy for his wife was left with him at their residence. Service was had upon the mortgagee by serving the proper officer of that institution. Neither is the fact disputed that the notice, a copy of which appears to be the only one required by the statutes of Oklahoma in condemnation proceedings. As a matter of fact, this is made clear by another part of Section 1203, supra, which provides, in certain circumstances, for the publication of such a notice as "in civil action, except summons need not be issued and served."

Petitioners contend that the notice meets the requirements of Section 1203 and that the latter statute is in harmony with the above referred to provisions of the Constitution of Oklahoma, and that under such cases as State ex rel. Southwestern Natural Gas Co. v. Brewer, District Judge (1938), 184 Okl. 129, 87 P. 2d 954; Stedman v. State Highway Commission (1935), 174 Okl. 308, 50 P. 2d 657; and Western Farmers Electric Cooperative v. Rowlett et al. (1955), Okl., 288 P. 2d 726, the respondent court was without authority to enter the order pursuant to which the landowners were permitted to file their request for a jury trial long after the statutory period for the filing of the same had expired.

Respondent contends that the notice that on a date certain the condemnor would present its application to

the district court for the appointment of commissioners to assess the damage to the land involved was insufficient to comply with the due process of law requirements of the Fourteenth Amendment to the U.S. Constitution. This contention is based upon the following propositions: a) the notice was not reasonably calculated to inform the owners of the land that they had been sued; b) the notice failed to apprise the owners of the land of the nature of the claim against them and the relief sought; and, c) it failed to afford the owners of the land an opportunity to be heard concerning the matter of just compensation.

The respondent directs our attention to cases from the U.S. Supreme Court, as well as from our own court, which hold that unless the method of obtaining service upon a defendant is reasonably calculated to inform him of the pendency of a proceeding that such *attempted service* may be declared null and void as insufficient under the due process clause of the U.S. Constitution. The cases cited to this effect by respondent are: Mullane v. Central Hanover Bank and Trust Co. (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Schroder v. City of New York (1962), 371 U.S. 208, 9 L.Ed. 255, 83 S.Ct. 279, 89 A.L.R. 2d 1398; Walker v. City of Hutchinson et al. (1956), 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178; and Bomford v. Socony Mobil Oil Co. (1968), Okl., 440 P. 2d 713.

While the cited cases undoubtedly stand as authority for the general proposition of constitutional law, as stated above, unless the notice served on the landowners in this matter was not sufficient to apprise them of the pendency of the condemnation proceeding then, we believe, such cases are of no application here. Of course, if the notice was insufficient to notify the owners that a condemnation proceeding had been commenced, then it would seem the respondent should have vacated its order appointing the

commissioners for their award of compensation would be, to say the least, suspect as an invalid award assuming it was not subsequently superseded by a verdict of a jury.

The question now arises, how should a landowner be notified of the commencement of a condemnation proceeding in order to satisfy the requirements of due process? Our Constitution, as well as our statute, requires only notice, which was given in this case, of the fact that at the end of ten days the district court would be requested to appoint commissioners to assess the damages to be awarded to the landowners which will result from an appropriation of their lands (describing them) for public uses.

In North Laramie Land Company v. Hoffman et al. (1925),268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953, the court had before it the statutes of Wyoming which provided for notice by publication, posting and mailing by registered mail to the landowners of a notice to the effect that the Board of County Commissioners were proposing to establish a roadway across the property of the landowner involved; that there would be an appraisal after which the Board would determine finally with regard to the establishment of the road and would fix the damages to be paid. The statute of Wyoming provided that the landowners affected would have thirty days, after that determination by the Board, within which to seek a judicial determination upon the damage issue. The U.S. Supreme Court observed that the statute afforded the landowners "* * *due process on the matter of damages, since the hearing in the District Court makes unnecessary a hearing before the board or the appraisers, and, through the publication of the board's action, the landowner is duly notified of the date from which his time for appeal begins to run." Regarding the objection which was to the effect that the statutory procedure was not in accord with due process of law be-

cause it did not provide for formal notice to the landowner that the board had acted in fixing the damages to be allowed and had thus set in motion the time limitation within which the landowner could appeal to a court of law, the court said:

> "* * * a state statute does not contravene the provisions of that Amendment (the 14th) unless, in some substantial way, it infringes the fundamental rights of citizens and, in passing on the constitutionality of a state law, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.
>
> "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their

subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. Huling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559; Ballard v. Hunter, 204 U.S. 241, at p. 262."

The discussion by the court on pages 286 and 287 of 268 U.S., also appears particularly appropriate to our problem.

The above cases of North Laramie Land Co. v. Hoffman and Huling v. Kaw Valley Railway & Improvement Co., along with the more recent case (cited by respondent) of Walker v. City of Hutchinson, supra, are all discussed in an annotation appearing in 1 L.Ed. 2d 1640-1642. The Walker case appears clearly distinguishable from our case for the reason that in that case the owner had no notice of the condemnation proceedings until after the time authorized by statute for appealing the question of compensation to a court had elapsed.

"Reasonable notice" is all that is required by our Oklahoma Constitution, Section 24, Article 2. Reasonable notice does not necessarily mean and we think does not require, in order to satisfy due process of law requirements, a formal notification to a landowner of every right guaranteed to him by law, including the existence of statutory procedural limitations upon his right to be heard in court on the question of his damages.

Every person holds his lands subject to the right of the sovereign to acquire an interest in it by condemnation proceeding if that interest is needed for public use. We are of the view and therefore hold that the only basic requirement protected by the Constitution in such cases is that the landowner have notice of the proceeding and an opportunity, at some stage in the proceeding, to be heard.

16A C.J.S. "Constitutional Law" §646, page 933. That opportunity to be heard is provided by statute in Oklahoma and the sixty day period following the filing of the commissioners' report and within which time one may demand a jury is not suggested to be unreasonable or arbitrary. While it may be desirable to notify a landowner of the filing of the commissioners' report in order to absolutely insure that a property owner be aware of the fact that the statutory limitation period has commenced running, we do not believe that such a requirement should be supplied by decree of this court in view of the fact that its absence does not render unconstitutional the procedural statute involved.

We hold that when a landowner is served with a notice, as the owners were in this case, it is reasonable to conclude that they are thus constructively notified that their rights to a trial upon the question of their damages may be lost by the passage of time; that it is not unreasonable to require a landowner in such a position to make arrangements with the clerk of the court to notify him when the commissioners' report has been filed. The landowner, as well as the condemning authority, should not be permitted to sit idly by and allow the statutory time to pass and then to complain that he (or the State) wasn't specifically informed of certain rights, which only the *opportunity* to exercise, are guaranteed by the Constitution.

It is the order and judgment of this court that a writ be issued to the respondent herein commanding him to vacate his purported order of June 28, 1969, in cause numbered 23869, entitled "State of Oklahoma, ex rel Department of Highways of the State of Oklahoma, Plaintiff v. Leon Madole and Ruth Madole, husband and wife, and American General Life Insurance Co., Defendants," and to strike the demand for a jury trial filed in said cause by Leon Madole and Ruth Madole.

CONCURRING: Irwin, C.J. and Davison, Williams, Blackbird, and Jackson, JJ.

DISSENTING: Berry, V.C.J. and Hodges and McInerney, JJ.

No. 43,659

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel DEPARTMENT OF HIGHWAYS OF THE STATE OF OKLAHOMA, Petitioner,

v.

HONORABLE ELVIN J. BROWN, Judge of the District Court of the 21st Judicial District, Cleveland County, Oklahoma, Respondent.

McINERNEY, J.: (Dissenting)

The issue here is whether the content of condemnor's notice to the landowner meets the minimum standards of the XIVth Amendment's due process clause. This presents a question of *federal law.*

Federal protection of condemnee's claim to fair treatment and orderly process in procuring just compensation for his property is not the product of the present-day trend to a liberal construction of our constitutional commands. It antedates the turn of this century. Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). For at least five decades the states have stood constitutionally compelled to afford the owner a *meaningful opportunity* "to be heard and to offer evidence as to the value of the land taken." Bailey v. Anderson, 326 U.S. 203, 205, 66 S.Ct. 66, 67, 90 L.Ed. 3 (1945); Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919). Unless notice *reasonably conveys "the required information" and is plain*

to understand, the process is a "mere gesture" and not due process. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Griffin v. Cook County, 369 Ill. 380, 16 N.E. 2d 906, 118 A.L.R. 1157; 16 Am.Jur. 2d, Const. Law, § 562, p. 966.

Condemnor's notice clearly did not contain the "required information" commanded by *Mullane*. While it advised condemnee of the time and place condemnor will present its application for appointment of the commissioners, it did *not* tell him that this was but the first step in a multi-stage proceeding the object of which was to invest the State with title to the affected land. In short, there is nothing in the heavy legal jargon of the notice that would plainly convey to the owner that a minimum which Anglo-American law required of legal process since time immemorial — *that it inform the party served of the relief demanded against him and apprise him of the result consequent on his default.* This much, if not more, is required to be imparted by a civil summons. 12 O.S.Supp. 1969, § 153. The recent amendment requiring a copy of the petition to be attached to the summons serves further to expand the quantum of knowledge our Legislature intended the defendant to have. 12 O.S.Supp. 1969, § 153.1. Far more information is required by statute to be contained in a notice issued under our administrative procedure. 75 O.S.Supp. 1969, § 309. It borders indeed on a legal paradox to hold that litigants in these cases may enjoy more favorable treatment than condemnees who enjoy *express* federal protection from unfair state procedures.

The argument that our statutory provisions operate here to amplify the deficiency in the content of condemnor's notice is predicated on the principle of common law that "no one is excused by the ignorance of the law". This principle must yield in the face of a plain constitutional

command as but an "illusory substitute" for notice. Electric Short Line Term. Co. v. City of Minneapolis, Minn., 64 N.W. 2d 149, 153. Due process in its present-day form plainly places a limit on the application of this common-law doctrine. Lambert v. People of the State of California, 355 U.S. 225, 228, 78 S.Ct. 240, 243 (1957). Any statement to the contrary that can be divined from North Laramie Land Company v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925) may no longer be regarded as a correct exposition of the present federal law.

Condemnor's notice did not reasonably convey that quantum of information that federal due process requires. Its endorsement by me would be tantamount to approval of less favorable treatment for condemnees than that which stands afforded by Oklahoma law to litigants in nearly all other classes of suits. This course would give approval to an unreasonable classification of state litigants that, in my opinion, is violative of equal protection. Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760 (1966).

I would deny the writ by an opinion requiring more ample notice having prospective effect only, i.e. to this case and to all condemnation notices issued after the date the opinion became final. Bomford v. Socony Mobil Oil Co., Okl., 440 P. 2d 713 (1968).

I am authorized to state that Berry, V.C.J. concurs in the views herein expressed.

APPENDIX B

(The following is the revised form of Notice to Defendants in condemnation actions as adopted by the Oklahoma Highway Department in December, 1969.)

IN THE DISTRICT COURT OF _____
COUNTY, OKLAHOMA

No. _____

State of Oklahoma, ex rel
Department of Highways of
the State of Oklahoma,
Plaintiff

v.

Defendants.

NOTICE TO DEFENDANTS

THE STATE OF OKLAHOMA,
TO THE ABOVE-NAMED DEFENDANTS:

You are hereby notified that the Department of Highways of the State of Oklahoma, acting under and by virtue of the laws of the State of Oklahoma, has filed legal proceedings in the above-named Court, and in those proceedings the State of Oklahoma, ex rel Department of Highways of the State of Oklahoma, is the plaintiff, and you are the defendant(s);

And that the Department of Highways, acting under the laws of the State of Oklahoma, has determined to locate a public State Highway upon the following described real estate:

(SEE NEXT PAGE)
(A metes and bonds description of
the property being condemned)

And that having been unable to procure that property from you by private purchase, the plaintiff, Department of Highways will on the_____day of_____, 19__, at the hour of 9:00 a.m. (or as soon thereafter as this matter can be heard) make application to the Judge of the District Court of_____County, Oklahoma, at its chambers in the Court House at_____, Oklahoma;

And said application will be made for an Order appointing three disinterested free holders of that County as Commissioners, to be selected from the current jury list of that county, and those three Commissioners shall be ordered to inspect the real property described herein and consider the injury, if any, which the owners of that land may sustain by reason of the appropriation thereof for the before mentioned public State Highway;

And those Commissioners shall be ordered to return their report to the Clerk of this Court, and within thirty days after the filing of that report any party to this proceeding may object thereto by filing written exceptions with the Clerk of this Court, and within sixty days after the filing of the Report of the Commissioners any party to this proceeding may demand a trial by jury on the issues involved, by filing a written demand therefor with the Clerk of this Court;

And if neither party object or except to the Report of the Commissioners or demand a trial by jury within the time limitations set out above, the Report of Commissioners shall be approved by the Court and the proceeding shall be closed;

And you may be present at the time set forth above for the Appointment of the Commissioners, if you so desire.

STATE OF OKLAHOMA, EX REL
DEPARTMENT OF HIGHWAYS OF
THE STATE OF OKLAHOMA

T. N. Keltner, Chief of
Legal Division

By:
Attorney for Highway Department
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1204

LEON MADOLE,
Petitioner,

VERSUS

STATE OF OKLAHOMA, EX REL. DEPARTMENT OF HIGHWAYS OF THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR REHEARING

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April, 1970

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1204

LEON MADOLE,
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STATE OF OKLAHOMA, EX REL. DEPARTMENT OF HIGHWAYS OF THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR REHEARING

JURISDICTION

The jurisdiction of this Court has already been invoked under 28 U.S.C. Section 1257 (3). Petitioner now prays for rehearing after certiorari denied under Rule 58.

INTERVENING FACTS

Shortly after Petition for Certiorari was filed herein, there was a great commotion in the Legislature regarding notice and House Bill 1676 was introduced in the Legislature of Oklahoma and passed by the House, the purpose of which was to make a condemnation procedure in Oklahoma conform to minimal due process of requirements of the 14th Amendment of the Constitution of the United States. But respondent, the Department of Highways of the State of Oklahoma, made numerous appearances before the

Senate Judiciary Committee in an effort to emasculate what a conscious stricken Legislature had proposed.

Now, with certiorari denied, the Bill has been returned to the committee where it will languish and die when the Legislature adjourns this week.

ARGUMENT

In its brief, the respondent shows the Court its new notice form, respondent's "Exhibit B" in its Appendix. It trys to show this Court that it has cured the ill complained of and that it acts in good faith, but the behavior of the Highway Department before the Legislature of Oklahoma clearly shows its lack of good faith and its intention of proceeding much as it has in the past with clear disregard of the due process provisions of the 14th Amendment. It thereby assures the recurrence of the problem we sought to cure. We urge this Court to settle that problem now.

This Court has never decided what minimum information notice must contain to satisfy due process. Seldom will a case be so beautifully formed on this one issue. No other issue is presented or involved. Petitioner's only pleading in the District Court is his motion to vacate the judgment for the reason that the court was without jurisdiction since the notice given did not measure up to the due process requirements of the 14th Amendment. All subsequent proceedings are based on review of the trial court's informed sustainment of that motion. Here is a constitutional question desperately in need of decision, standing isolated from all other questions, both state and Federal. Since the filing of this Petition, the Department of Highways has shown its

basic underlying lack of good faith by actively and successfully lobbying against a Bill designed to insure proper notice to landowners.

In the meantime, bulldozers are piling dirt for a highway interchange thirty (30) feet deep over the land that grew petitioner's alfalfa not long ago. Petitioner is a citizen of Oklahoma and of the United States. As a person he is a farmer, of little education; who has worked his whole life to acquire what little farm land he has. Land has been taken from him by a perverted use of the Court's process. The respondent's repeated assertions at every level of litigation that this petitioner has conceded oral conversations and correspondence are utterly untrue. Petitioner has insisted throughout that the procedures were never explained to him, that he was never informed that he had been sued and that he had no opportunity to be heard. Respondent misleads this Court in stating such "uncontroverted facts." Petitioner concedes only the receipt of the written notice personally served upon him.

Petitioner begs this Court to hear his case and to direct the Supreme Court of Oklahoma to so order process in that state that neither the Highway Department nor the railroads nor any other utility nor any branch or subdivision of the State Government shall ever again deprive any person of his property without informing him that he has been sued and affording him an opportunity to be heard. It is a good, sound, novel constitutional question which will occur again and again with increasing frequency unless this Court intervenes now in this case to enforce on behalf of the people the constitutional restraint on the condemning power of the State Government.

CONCLUSION

Because of the now demonstrated intention of the Department of Highways of the State of Oklahoma to persevere in the future as it has in the past in disregard of the landowner's right to notice sufficient under the due process clause of the 14th Amendment of the Constitution to the United States, this Court should grant a rehearing on the question of whether or not a Writ of Certiorari should issue to the Supreme Court of Oklahoma.

Respectfully submitted,

JEROME E. HEMRY
WILLIAM H. HENDERSON
THOMAS H. TUCKER
1607 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

April, 1970

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

Dated this 15th day of April, 1970.

JEROME E. HEMRY
Counsel for Petitioner